UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. JOHN MARSHALL, Warden, Respondent.	Civil No. 07cv2183-DMS (RBB) **ORDER:** **(1) DENYING MOTION FOR STAY AND ABEYANCE WITHOUT PREJUDICE [DOC. NO. 12];** **(2) REQUIRING ADDITIONAL INFORMATION REGARDING PETITIONER'S MOTION FOR LEGAL COUNSEL [DOC. NO. 10]; AND** **(3) GRANTING MOTION TO FILE AN AMENDED FEDERAL HABEAS PLEADING [DOC. NO. 14]**

Petitioner James H. Cunningham, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus [doc. no. 1] on November 13, 2007. He also filed a Motion for Stay and Abeyance of Federal Habeas Corpus Petition to Exhaust Additional Unexhausted Claims in the State Courts [doc. no. 3], which District Judge Dana M. Sabraw denied without prejudice on November 27, 2007 [doc. no. 5]. On January 22, 2008, Petitioner submitted a renewed Motion for Stay and Abeyance of Federal Habeas Petition [doc. no. 12], which was filed nunc pro tunc to January 9,

2008. Cunningham concurrently filed a “Motion for Request of Legal Counsel for the Incompetent” [doc. no. 10]. Petitioner also submitted a Motion and Request to File an Amended Federal Habeas Pleading with All Petitioner’s Claims [doc. no. 14], which was filed nunc pro tunc to February 8, 2008.

I. MOTION FOR STAY AND ABEYANCE

Petitioner has filed a second Motion for Stay and Abeyance requesting that the Court hold his Petition in abeyance while he returns to state court to exhaust newly-discovered claims. (Mot. for Stay 1.) Cunningham’s previous Motion for Stay was denied without prejudice on November 27, 2007, because Petitioner failed to identify any potentially meritorious claims that had not been exhausted. (Order Denying Mot. for Stay [doc. no. 5] 2.) Cunningham was informed that he could file a renewed motion, but it must “identify which claim or claims he has not exhausted and wishes to exhaust, and must set forth facts in an attempt to demonstrate good cause for his failure to timely exhaust the state court remedies with respect to any unexhausted claim.” (Id. at 3.)

Petitioner’s renewed Motion does not comply with the Court’s instructions. The Motion does not identify a specific claim that Cunningham wishes to assert. Instead, the Motion merely contains a list of legal terms and citations. (Mot. for Stay 2.) Petitioner indicates that there are “newly-discovered trial errors . . . scattered about” the trial transcripts. (Id. at 3.) This is not sufficient to warrant a stay of the pending habeas proceedings because Cunningham has not identified any particular claim that has not been exhausted in state court. Petitioner’s Motion for Stay is **DENIED WITHOUT PREJUDICE**. Cunningham may renew his Motion, if he wishes, but the renewed motion must address the specific claim he wishes to exhaust and his diligence in seeking to discover and exhaust the claim.

II. MOTION FOR COMPETENCY HEARING

In his Motion for Legal Counsel, Cunningham asserts that he is currently suffering from a serious mental and emotional illness, for which he is prescribed medication, that renders him incompetent to litigate his Petition. (Mot. for Legal Counsel 1, 4.) Although he previously received legal assistance from a fellow inmate, the inmate has been transferred out of the prison and can no longer assist him. (Id.)

Pursuant to Federal Rule of Civil Procedure 17(c), the Court "shall appoint a guardian ad litem for an . . . incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the . . . incompetent person." Fed. R. Civ. P. 17(c); see R. Governing Habeas Corpus Cases 11 (stating that the rules of federal procedure apply in habeas cases to the extend they are not inconsistent with habeas corpus statutes or rules).

In Allen v. Calderon, 408 F.3d 1150 (9th Cir. 2005), the Ninth Circuit held that where a pro se petitioner submits "substantial evidence" of his incompetence, the district court should hold a competency hearing to determine whether the petitioner is "competent under an appropriate standard for habeas petitioners." Allen, 408 F.3d at 1153-54. Although the Court did not specify what constitutes "substantial evidence" of incompetence or what the "appropriate standard" is, it gave some guidance.

In Allen, the petitioner submitted his own sworn declaration and a declaration from a fellow inmate which stated that Allen was mentally impaired and did not understand the court's orders. Id. at 1151. He also submitted a letter from a prison psychiatrist which stated that Allen was in the Enhanced Outpatient Program ("EOP") at the prison, had been "diagnosed with Chronic Undifferentiated Schizophrenia and [was] taking two psychotropic medications." Id. at 1151-52. Allen filed a second declaration in support of a motion for appointment of counsel in which he stated that he suffered from a "'debilitating mental illness that requires a course of treatment that includes the use of various psychotropic medications'" and that the mental illness combined with the medications "'severely [hinder] his ability to comprehend or correctly respond to the determinations and Orders made by the Court.'" Allen, 408 F.3d at 1152. The Ninth Circuit concluded that this was sufficient to require the district court to make a determination as to Allen's competency by appointing counsel and conducting a competency hearing. Allen, 408 F.3d at 1153-54.

Attached to Cunningham's Motion are copies of his prison medical records. (See id. Attach.) The records show that Petitioner has received psychiatric care since he was incarcerated in 2005. When he was evaluated on April 4, 2005, soon after he began serving his sentence, he reported to the psychiatrist that he had been taking psychotropic medications intermittently for eight years. (Id. pt. 1, at 68-69.) He was diagnosed with a nonspecified mood disorder and prescribed Prozac and Remeron. (Id. at 69.)

Petitioner was seen by psychiatrists regularly thereafter. On May 18, 2005, his doctor added a prescription for Seroquel. (Id. at 66.) His prescription for Prozac was discontinued at some point, and he was prescribed the antidepressant Wellbutrin in July 2006. (Id. pt. 3, at 17.) He continued with this medication regimen and regular doctor visits throughout 2006. (See id. pt. 1, at 10-15.)

Cunningham was evaluated on January 17, 2007, for a renewal of his treatment plan. (Id. at 25.) He reported feeling depressed and paranoid and having some suicidal thoughts and difficulty sleeping. (Id. at 29.) Petitioner was diagnosed with a depressive disorder and a nonspecific psychotic disorder. (Id. at 29, 70.) The doctor prescribed Seroquel for the psychosis, Wellbutrin for the depression, and Vistaril for insomnia. (Id. at 70.)

He continued with regular psychiatric visits throughout 2007. (See id. pt. 2, at 14-28.) The last two visits for which the Court has medical records were September 4, and October 16, 2007. (Id. at 14-15.) On September 4, 2007, the doctor noted that Cunningham was "overall, more relaxed, less paranoid . . . ." (Id. at 15.) The doctor also noted that Petitioner was taking his medications as prescribed. (Id.)

Cunningham returned to the doctor on October 16, 2007. (Id. at 14.) At this visit he complained of depression and anxiety over "legal stuff." (Id.) He was informed that the California Department of Corrections was discontinuing the use of Wellbutrin on November 1, 2007, so he would have to be prescribed a different antidepressant medication. (Id.) Cunningham stated that he did not want a different antidepressant. (Id.)

Because the Court does not have any records after October 16, 2007, it is unclear whether Petitioner is currently taking antidepressant medication, what his current mental state is, or whether he is currently suffering medication side effects that hinder his ability to represent himself in this case. Cunningham was due for another review and an update of his treatment plan on January 17, 2008. (Id. pt. 1, at 70.)

At this point, Petitioner has not produced substantial evidence of incompetence to warrant the Court conducting a competency hearing. Although Cunningham has provided medical records showing that he was diagnosed with a mental disorder, the Court does not know the extent to which the disorder is currently affecting him because the most recent medical records are missing. Additionally, the evidence presented to the Court does not demonstrate that Petitioner's mental condition impairs his ability to understand the Court's orders or otherwise litigate his Petition.

Accordingly, the Court **ORDERS** the following:

(1) Petitioner shall file a document titled "Additional Information Re: Application for Guardian Ad Litem" with accompanying declarations and exhibits no later than April 1, 2008. Cunningham shall submit declarations and exhibits, if available, to establish the following: (a) Petitioner currently suffers from a mental illness, and (b) the mental illness prevents him from being able to understand and respond to Court orders. The additional information may include declarations signed under penalty of perjury from Petitioner, medical personnel, and others having personal knowledge of Petitioner's incompetence, in addition to

recent institutional medical and psychiatric records not yet provided to the Court.[1]

(2) Respondent shall file a response to Petitioner's Additional Information Re: Application for Guardian Ad Litem no later than April 25, 2008. The response shall include the results of Respondent's independent investigation into Cunningham's competence in addition to legal argument.

III. MOTION TO FILE AN AMENDED PLEADING

Petitioner filed a Motion and Request to File and Amended Pleading [doc. no. 14] in which he requests the Court grant him an extension of time in which to file an amended petition including newly-discovered grounds for relief. (Mot. to Amend 1-2.)

Cunningham may amend his Petition once without leave of Court at any time before Respondent files a responsive pleading. See Fed. R. Civ. P. 15(a). Because Respondent has not yet filed an answer, Petitioner may file an amended petition without seeking the Court's permission. Accordingly, Cunningham's request for leave to file an amended petition is denied as premature.

IT IS SO ORDERED.

DATED: February 21, 2008

RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Sabraw
All Parties of Record

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[1] The Court acknowledges that gathering and submitting such additional information of incompetence may pose a challenge for Petitioner; however, Petitioner is required under Ninth Circuit law to submit substantial evidence of incompetence before he is entitled to a competency determination. Allen, 408 F.3d at 1153.